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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/805,821	03/22/2004	Gregory Robert Pockat	29561-1	1481
23482	7590	09/09/2004	EXAMINER	
WILHELM LAW SERVICE, S.C. 100 W LAWRENCE ST THIRD FLOOR APPLETON, WI 54911			TARAZANO, DONALD LAWRENCE	
			ART UNIT	PAPER NUMBER
			1773	

DATE MAILED: 09/09/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

<b>Office Action Summary</b>	<b>Application No.</b> 10/805,821	<b>Applicant(s)</b> POCKAT ET AL.	
	<b>Examiner</b> D. Lawrence Tarazano	<b>Art Unit</b> 1773	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☐ Responsive to communication(s) filed on \_\_\_\_.
- 2a) ☐ This action is **FINAL**.                      2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1-21 is/are pending in the application.  
     4a) Of the above claim(s) \_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-21 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
     Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
     Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).  
     a) ☐ All    b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- |  |   |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)  | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. ____. |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)   | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152)             |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)<br>Paper No(s)/Mail Date <u>3/22/04</u> . | 6) <input type="checkbox"/> Other: ____.  |

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## DETAILED ACTION

### *Double Patenting*

1. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and, *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

2. Claims 1-21 are rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-26 of U.S. Patent No. 6,709,687. Although the conflicting claims are not identical, they are not patentably distinct from each other because the essential difference between the claims in the allowed patent and those of the pending application is the presence of a barrier layer. It would have been obvious to one having ordinary skill in the art to have added a barrier layer to a film depending on the end use of the film and what was being packaged.

### *Claim Rejections - 35 USC § 103*

3. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person

having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

1. Claims 1-21 are rejected under 35 U.S.C. 103(a) as being unpatentable over Curlam® Grade 1830-G in view of Kneale (6,046,254).
2. The Curlam® brochure shows films having the claimed structure in which an EVA layer comprises an anti-fogging agent, and the films are used to package oxygen sensitive food products (see the figure regarding the relative thickness of the layers).
3. While it is clear that an antifogging agent is added, the limited disclosure of the brochure does not make clear what the additive is or how much of it is added.
4. Kneale demonstrates that antifogging added to EVA in the amounts claimed (see Column 2, lines 30-44 and claims).
5. The antifogging agents comprises:
  - a. a C<sub>8</sub> or higher ester, diester, and/or triester of a C<sub>2</sub> to C<sub>8</sub> polyhydric alcohol; and
  - b. a mono-or dialkoxylated C<sub>10</sub> or higher amine. In a preferred embodiment, said film further comprises
  - c. an alkoxyated alkylphenol or derivatives thereof. Said antifog agent is present in an amount, which imparts antifog resistance performance to said film in about less than an hour.
6. It would have been obvious to one having ordinary skill in the art at the time the invention was made to have used the antifogging agents taught by Kneale in the Curlam® Grade 1830-G films in the amounts claimed since these materials provide good antifogging performance.

7. Regarding the specific foods claimed, the Curlam® Grade 1830-G packaging films have antifogging properties so it is clear that they would be used to package food which had some amount of water content since fog is water condensation.

8. Since foods such as meat water, it would have been obvious to one having ordinary skill in the art at the time the invention was made to have used Curlam® Grade 1830-G to package these foods when barrier properties were needed and non-fogging properties were desired.

9. It would have been obvious to one having ordinary skill in the art at the time the invention was made to have varied the thickness of Curlam® Grade 1830-G depending on the product packaged; this would relate to a cost / benefit analysis.

10. It would have been obvious to one having ordinary skill in the art at the time the invention was made to have varied the thickness of the layers in the films depending on the properties of the food material to be packaged.

11. The Curlam® Grade 1830-G films can be printed; the choice of the specific printing is up to the individual as it related to the end use of the films.

12. Since the films have antifogging properties they would be useful for packaging moist or semi-moist foods. (There would be no reason to use a non-fogging film for a dry material).

1. Claims 1-21 are rejected under 35 U.S.C. 103(a) as being unpatentable over Fischer et al. (5,523,136) in view of Kuo et al. (5,962,092).

2. Fischer et al. teach multilayer films having a composite seal layer (20) which faces food when packaged, in which these composite sealing layers make up a large portion of the films'

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thickness as claimed. These films are used for packaging vegetables and are oxygen permeable, but Fischer et al. fail to teach the use of anti-fogging agents.

3. Kuo et al., which is from the same field of endeavor as Fischer et al., teach that surface active agents (i.e. antifogging agents) are added to films used for packaging produce to make the packaging more appealing.

4. It would have been obvious to one having ordinary skill in the art at the time the invention was made to have used the anti-fogging agents taught by Kuo et al. in the structures taught by Fischer et al. in order to produce a more appealing packaged food article.

13. Since the films have antifogging properties they would be useful for packaging moist or semi-moist foods. (There would be no reason to use a non-fogging film for a dry material).

5. Claims 3, 6, 12, and 20 rejected under 35 U.S.C. 103(a) as being unpatentable over Fischer et al. (5,523,136) in view of Kuo et al. (5,962,092) as applied to claims 1-21 above, and further in view of Kneale (6,046,254).

Kuo et al. teach using antifogging agents used in the production of permeable films. The purpose of Kneale is to show that various additives provide that function in polyolefin films. It would have been obvious to have used the anti-fogging agents disclosed in Kneale in the structures taught by Kuo et al. or Fischer et al. in view of Kuo et al. since this is merely the substitution of one functionally equivalent additive for another.

14. Since the films have antifogging properties they would be useful for packaging moist or semi-moist foods. (There would be no reason to use a non-fogging film for a dry material).

***Conclusion***

Any inquiry concerning this communication or earlier communications from the examiner should be directed to D. Lawrence Tarazano whose telephone number is (571)-272-1515. The examiner can normally be reached on 8:30 to 6:00 (off every other Friday).

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Deborah Jones can be reached on (571)-272-1535. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

D. Lawrence Tarazano  
Primary Examiner  
Art Unit 1773



dlt